Supreme Court of the United States.

October Term, 1903.

No. 343.

CONTINENTAL NATIONAL BANK, OF MEMPHIS, TENN.,
PLAINTIFF IN ERROR,

vs.

G. C. BUFORD.

STATEMENT OF THE CASE.

Plaintiff's complaint analyzed contains the following statements:

First. That the plaintiff is a National Banking Corporation in liquidation.

Second. That the Bank of Mammoth Springs was incorporated October 20th, 1889, under sections 1326 to 1358, inclusive, of Sandells & Hill's Digest, of Arkansas, and became insolvent "some years prior to July 27th, 1897."

Third. That the defendant was president of said Bank of Mammoth Springs from June 9th, 1891, to June 9th, 1896.

Fourth. That on September 6th, 1894, the Bank of Mammoth Springs "*became indebted* to plaintiff in the sum of $2,500.00, *by note* for that amount due November 8th, 1894. That on said date said note was renewed and upon maturity of said renewal it was likewise renewed. These renewals continued from time to time, with occasional payments at some of the times of renewal, until May 20th, 1897, when said Bank of Mammoth Springs being indebted to plaintiff in the sum of $1,150.00, as balance due on said original indebtedness, executed to the plaintiff its note for that amount, due and payable three months after that date, with interest," etc.

Fifth. "That on May 3rd, 1894, said Bank of Mammoth Springs *was also indebted* to the plaintiff in the sum of $5,000.00, *by note* which by the same process of renewals and part payments as above stated in regard to the first note was reduced on May 2nd, 1897, to $3,500.00, for which said Bank of Mammoth Springs executed to plaintiff its note for said amount, due ninety days after date."

Sixth. "That in the years 1894 to 1897, inclusive, said bank *was likewise indebted* to plaintiff in various sums, at different times *due upon open account. That the balance due on said account June 30th, 1897, was $333.55*, and in April, 1898, when the last entry appears upon said account, the balance was and now is, exclusive of interest, $2,738.05."

Seventh. Copies of the two notes and account are filed with the complaint as exhibits "A," "B," and "C." (But exhibits "A" and "C" contradict the allegations of the complaint in this: Exhibit "A" is a note executed to

H. G. King and endorsed in blank, and not payable to plaintiff as alleged. Exhibit "C" shows an account made in 1897 and 1898, and not in 1894, as alleged.)

Eighth. The following sections of the Arkansas Statute are pleaded:

"*Section* 1337. The president and secretary of every corporation organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the 1st day of January or of July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the names and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day of February or of August with the County Clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"*Section* 1346. The certificates required by sections 1334, 1337, 1343 and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly.

"*Section* 1347. If the president and secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of any such neglect or refusal."

Ninth. That during the defendant's term of office,—from June 9th, 1891, to June 9th, 1896, he failed to comply with the provisions of this statute.

Tenth. "Plaintiff therefore charges that said defendant is by reason of the foregoing facts, liable to it in this action, *founded upon said statute*, for the amount of the indebtedness due it by said Bank of Mammoth Springs."

This complaint was filed July 21st, 1900, more than three years after the maturity of the original indebtedness, pleaded; and more than three years after the final settlement between the plaintiff and the Bank of Mammoth Springs of all its indebtedness, when exhibits "A" and "B" were given for balances then due the plaintiff as alleged; and more than three years after defendant ceased to be the president of the Bank of Mammoth Springs; and more than two years after the maturity of the last renewal notes.

To this complaint, the defendant interposed the following demurrer:

DEMURRER.

"The defendant demurs to the complaint of the plaintiff for insufficiency, and for cause of demurrer says:

I.

That the said complaint shows on its face that the plaintiff's cause of action is barred by the statute of limitation of two years.

II.

That the said complaint shows on its face that the plaintiff's cause of action is barred by the statute of limitation of three years.

III.

That said complaint does not allege that defendant was president of the Bank of Mammoth Springs when the debt sued for was contracted.

IV.

That said complaint does not allege that the debts sued for were contracted during the period of defendant's neglect or refusal to file the certificate required by section 1337 of the Digest.

V.

Because said complaint does not state facts sufficient to constitute a cause of action."

JUDGMENT.

The Circuit Court sustained said demurrer and the plaintiff prosecuted a writ of error to the United States Court of Appeals, where the judgment of the Circuit Court was affirmed, and from this latter judgment, plaintiff brings error to this court.

The opinion of the Circuit Court is found in the record, pp. 18 to 20 inclusive, and is also reported in Fed. Rep. 188. The opinion of the Court of Appeals is found on pages 27 to 30 of the record, and is reported in 114 Fed. Rep. 290.

BRIEF AND ARGUMENT.

I.

The first ground of demurrer is based on the two year statute of limitation which is as follows:

"All actions upon penal statutes, where the penalty or any part thereof, goes to the state or any county or *person suing for the same*, shall be commenced within *two years after* the offense shall have been committed, *or the cause of action shall have accrued.*" Sandell & Hill's Digest, Sec. 4826.

This ground of demurrer is well taken whether defendant's liability, under the statute pleaded, accrued upon his failure to file the reports, or upon the maturity of the original debt, or upon the maturity of the last of the series of notes given in renewal of said original debt, since the last named notes matured Aug. 20th, 1897, and Aug. 27th, 1897, respectively, and this suit was not filed until July 21st, 1900,—more than two years after the maturity of said renewal notes.

While this court in *Huntington vs. Attrill*, 146 U. S. 657, held a statute making officers of a corporation, who sign and record a false certificate of the amount of its capital stock liable for all its debts, *not to be penal in an international sense*, it did not overrule its prior decisions holding statutes similar to the one under consideration to be penal for other purposes, but said:

"The question whether a statute of one state, which in some aspects may be called penal, *is a penal law* in the *international sense*, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice

of the state, or to afford a private remedy to a person injured by the wrongful act."

There is no conflict between this holding and that announced in *Steam-Engine Company vs. Hubbard*, 101 U. S., 188, where this court was called upon to construe the statute of Connecticut, which, like the Arkansas statute, required the president and secretary of private corporations to file a certificate showing the condition of the affairs of the company, at stated periods. The defenses set up were:

1. That the defendant was never legally elected president.

2. That the debt was not contracted while he was acting as president.

3. That by a proper construction of the statute, he is not liable for the debt sued for.

This court said:

"Preliminary to those inquiries, the defendant contends that the statute upon which the action is brought is penal and should be strictly construed, *in which proposition the court unhesitatingly concurs.* Statutes somewhat similar in character have been passed in several states, in all of which states it is held that the statutes are penal, and that for that reason their provisions must receive a strict construction."

Neither does *Huntington vs. Attrill*, *supra*, overrule *Chase vs. Curtis*, 113 U. S., 452, where this court had under consideration a statute of New York, which makes the trustees of private corporations liable for the debts of the corporation, for the failure of the corporation, through its president and trustees, to file and publish a similar report, and Mr. Justice Mathers at the outset said:

"It is the well settled rule of decision, established by the Court of Appeals of New York in numerous cases, that this section of the statute, to enforce which the present action was brought, is penal in its character, and must be

construed with strictness as against those sought to be subjected to its liabilities."

In *Bank vs. Remsen*, 158 U. S., 337, defendants are sued on a statutory liability for failure to file reports, which provides that the directors and trustees of such corporations "shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." N. Y. Rev. Stats. 8th Ed. Vol. 3, page 1957, and this court said:

"That the statute is one of a penal character is settled, not merely by various decisions of the Court of Appeals of New York, but also expressly by this court in *Chase vs. Curtis*, 113 U. S. 452, though as since held not a penal law in the international sense. *Huntington vs. Attrill*, 146 U. S. 657."

Judge Thompson, in his work on corporations, section 4221, speaking of these statutes says:

"In many of the states there exist statutes, and even constitutional ordinances, requiring the directors or trustees of corporations to make and file, in some designated public office, or publish in some designated manner, at stated periods, reports of the conditions of the affairs of the company. If the directors fail to perform this duty, they are made liable to pay any debts of the company contracted during the period when they are thus in default. These statutes which make an agent liable to pay the debt of his principal in consequence of a mere non-feasance, fall within the class which are deemed penal and to be strictly construed."

In *Brown vs. Clow*, 62 N. E. 1006, the Supreme Court of Indiana, in passing on a statute of that state making the directors of private corporations liable for all debts of the corporation for violating the statute requiring the capital stock of such corporation to be fully paid in within eighteen months from incorporation, held that the action based on

such statute was penal within the meaning of the statute of limitations of that state requiring actions to recover penalties to be brought within two years. Citing *Huntington vs. Attrill, supra; Chase vs. Curtis, supra*, and a number of cases from other states.

In *Chapmam vs. Lynch*, 51 N. E., 275, decided by the New York Court of Appeals, in 1898, defendants were sued as directors of a corporation for failure to file reports required by the New York statute which is substantially like the Arkansas statute, and that court held the statute created a penal liability and that the statute of limitations applicable to penal actions applied. The court cites a large number of prior cases from that state, among which are the cases cited and followed by this court in *Chase vs. Curtis*, and *Steam-Engine Company vs. Hubbard, supra.*

In *Merchants National Bank of Chicago vs. Northwestern Manufacturing Company*, 51 N. W., 117, the Supreme Court of Minnesota held a similar statute penal within the meaning of the statute of limitations of that state and on this point said:

"We have heretofore (*Patterson vs. Stewart*, 41 Minn. 84, 42 N. W. Rep., 926,) referred to this statute—section 142—as highly penal in its nature, having a twofold object: FIRST, to enforce diligence and fidelity on the part of the corporate officers; and, SECOND, to afford a remedy to creditors of the corporation. While this remedial purpose of the law is unquestionable, it is equally plain that the liability imposed is in the nature of a penalty."

In *Gennert vs. Ives*, 61 N. E., 9, the Supreme Court in construing a statute of that state imposing personal liability on directors for failing to make the report required by law, says:

"Statutes imposing liability of the character here sought to be established have been uniformly held to be penal in their nature, and to require strict construction.

Thomp. Liab. Off, 447; *Arms Co. vs. Barlow*, 63 N. Y., 62; *Breitung vs. Lindauer*, 37 Mich., 217. And it is held that the penalty will only be imposed in cases where the plain language of the provisions requires it. *Whitaker vs. Masterton*, 106 N. Y., 277, 12 N. E., 604."

In *Patterson vs. Thompson*, 86 Fed. Rep., 85, the United States Circuit court, for the district of Oregon, construed section 3231, 2 Hill's Ann. Laws Ore., to create a penal liability against the directors of private corporation for declaring dividends in violation of said statute, and also held that the statute of limitations applicable to penal actions applied.

The same rule was announced by the Supreme Court of Montana, in *State Savings Bank of Butte City vs. Johnson*, 45 Pac., 662, construing a similar statute requiring the trustees to file such reports. The liability was held to be penal within the meaning of the one-year statute of limitations applicable to penal actions.

In *Fields vs. Haines*, 28 Fed., 919, in the United States Circuit Court, for district of Vermont, in passing on a statute of that state which prohibited the contracting of debts exceeding two-thirds of the capital stock of corporations, and distinguishing such a statute from those requiring reports to be filed or published as does the Arkansas statute, Wheeler, J., said:

"Where a liability is declared for some act or neglect in no way connected with the contracting of the debt, as for neglecting to file reports, it is undoubtedly penal."

A statute of Colorado requires a report to be filed annually, signed and verified by the president and secretary, showing the condition of affairs of the corporation and provides that "all the directors or trustees of the company shall be jointly and severally liable for all debts of the com-

pany that shall be contracted during the year next preceding the time when such report should be filed."

In *Thatcher vs. Solmon*, 64 Pac., 368, the Court of Appeals of that state construed this statute to be penal.

And in *Hazleton vs. Porter et al*, 67 Pac., 170, the same court held that the one-year statute of limitations to apply, which reads:

"All actions and suits for any penalty or forfeiture of any penal statute brought by this state, or any person to whom the penalty or forfeiture is given in whole or part, shall be commenced within one year next after the offense is committed."

Note, the Arkansas statute adds: "Or cause of action shall have accrued."

See also the following cases holding such and similar statutes to be penal:

Losee vs. Bullard, 79 N. Y., 404;
Knox vs. Baldwin, 80 N. Y., 610;
Duckworth vs. Roach, 81 N. Y., 49;
Rector vs. Vanderbilt, 98 N. Y., 170;
Veeder vs. Baker, 82 N. Y., 156;
Credit Indemnity Co. vs. Elliss, 156 Ind., 212; 59 N. E., 679;
Stokes vs. Stickney, 96 N. Y., 323;
Garrison vs. Howe, 17 N. Y., 458;
Bank vs. Commonwealth, 26 Pa. St., 451;
Gadsden vs. Woodward, 103 N. Y., 242;
Wiles vs. Suydam, 64 N. Y., 173;
Halsey vs. McLean, 12 Allen, 438;
Bank vs. Bliss, 35 N. Y., 412;
Irvin vs. McKeon, 23 Cal., 472;
Bank vs. Price, 33 Md., 487;
Moies vs. Sprague, 9 R. I., 451;

Iron Co. vs. Pierce, 4 Biss. 327 Fed. Cases, No. 14367;
Gregory vs. Bank, 3 Colo., 333;
Breiting vs. Lindaner, 37 Mich., 217;
Stebbins vs. Edmond, 12 Gray, 203;
Derrickson vs. Smith, 26 N. J. L., 166;
Michell vs. Hotchkins, 48 Conn., 9;
Hill vs. Frazier, 22 Pac. St., 320;
Bank vs. Johnson, 45 Pac., 662;
Kritzer vs. Woodson, 19 Mo., 327.

II.

The second ground of demurrer is well taken, whether the liability sought to be enforced against this defendant be regarded as a "penalty" or "statutory liability." See *Nebraska National Bank vs. Walsh*, 59 S. W., 952.

Indeed it is conceded by plaintiff in error that the right of action afforded by the statute on which this suit is based is barred in three years from the time when such right of action accrues. But he contends that his right of action under the statute did not accrue until the maturity of the renewal notes which were executed long after defendant went out of office. Defendant's contention being that the right of action accrued when the debt was contracted, and at all events when the original debt matured.

We are not cited to a single authority by counsel that answers this question—when the right of action given by such statutes accrues, though the books are full of cases on this identical point. To this question the courts have given two answers, either of which defeats the plaintiff's right to recover herein, and either of which sustains the Circuit Court of Appeals, and the trial court.

Some courts hold that the right of action based on statutes with the peculiar wording of the Arkansas statute accrues immediately upon the failure of the officer to comply with the law, or rather contemporaneous with the violation of the law. While other courts hold that the right accrues at the maturity of the debt contracted during such neglect and that the renewal of such debt or extension of the time of payment by the corporation and the creditor, or partial payments by the corporation, does not prevent the running of the statute or stop its running after it commences to do so.

We will call attention to a few authorities which hold that the right of action accrues against the officer immediately upon the violation of the law.

Thompson on Corporation says:

"SECTION 4222. TIME AT WHICH THE DEBT IS DEEMED TO ACCRUE.

"The principal question which relates distinctively to these statutory provisions, and which is not common to all statutes imposing a personal liability upon directors for official defaults, has reference to the time when the debt for which the directors may be charged is deemed to accrue. If there has been a default in making the reports required by such a statute, during a particular year, and during that year a debt is contracted, and during a subsequent year, within which the directors are not in default in making of their reports, a promissory note is given for the debt, it would seem that, for the purposes of the relief afforded the creditor by the statute, the debt ought to be deemed to have accrued from its original inception, and not from the making of the note. And this is obviously the correct view." Citing cases supporting this view.

In *Colorado Fuel & Iron Co. vs. Lenhart et al*, 41 Pac., 834, referred to in the later cases cited above, the Court of Appeals said of such a statute:

"The statute which is invoked is penal in its character. The debt was owing by the rolling-mills company, and not by the defendants. Its amount was recoverable from them as a penalty, and not as an indebtedness. They are therefore entitled to a strict construction of the statute. There are no equities in the plaintiff's favor, as against them. It is entitled to what the letter of the law gives it, and no more. On account of the failure to make the required report, *the defendant's liability attached, and was absolute, immediately upon the contraction of the debt.* The records were open to the plaintiff's inspection, and, if it was without knowledge of what had been done, its ignorance is chargeable to its own negligence. To enable it to recover it must bring itself strictly within the law, and for its failure to do so it alone is responsible. *Larsen vs. James*, 29 Pac., 183."

"This question was under consideration by this court in a case very recently decided. *Thatcher vs. Salomon*, 16 Colo. App., ——, 64 Pac. 369. We there declared the true doctrine to be that a debt is contracted when, in consideration of value received by the corporation a payment is to be made, no matter whether at once or at a future period. When, therefore, in this instance, the corporation failed to make its annual report on March 2, 1891, the directors instantly became liable for the whole of the debt due the plaintiff. At that time a cause of action arose, in favor of the plaintiff and against these defendants, for the collection of this penalty imposed by law. The universal rule is that a statute of limitations begins to run when the right of action which is embraced in its provisions accrues, and the running of the statute is not arrested, except by certain well-recognized circumstances, which there can be no pretense of obtaining in this case, and which is not claimed. No fraud nor concealment is alleged. This court in *Iron Co. vs. Lenhart*, 6 Colo. App., 515, 41 Pac., 835, said, in considering this section: 'When the liability to the penalty is incurred, the creditor's cause of action for its recovery accrues, and the statute is set in motion, and does not stop until the action is commenced or barred.' We do not think

language could be plainer. To the same effect is *Clough vs. Oil Co.*, 25 Colo., 528, 55 Pac., 809, also in a case involving the construction of the same section. The liability of the directors does not arise from any promise to pay, express or implied, or from any contractual relation whatever. The law imposes it upon them as a penalty for an offense committed by them in disobeying its mandates, and the measure of the penalty is the amount of the indebtedness contracted during the preceding year." Said the Colorado Court of Appeals in *Hazelton vs. Porter*, 67 Pac., 170, construing a similar statute."

The same court used the following language in *Thatcher vs. Salomon*, 64 Pac., 370:

"It will be observed that the statute makes the directors liable for the debts of the company that were *contracted* during the year previous to the time when the report should be made, until the default is terminated by the making of the report or by filing the certificate of paid-up capital stock. It says nothing about debts then matured or not matured,—those upon which a cause of action then existed or did not exist. It was sufficient if the debt had been contracted. We think the true rule is very aptly expressed by a New York court in construing that portion of a similar statute wherein identically the same language is used as in the Colorado statute, and is now under consideration: 'The true doctrine is that a debt is contracted when, in consideration of value received by a corporation, a payment is to be made, no matter whether at once or at a future period.' *Vernon vs. Palmer*, 48 N. Y., Super. Ct., 231. This rule is supported by and in accord with all of the New York cases, as we read them.*** In a very recent case, decided only last October, the New York Court of Appeals said: 'The liability is for debts then existing; that is, whether due or not,'—thus expressly recognizing the fact, as do the other cases cited, that the liability of the directors is not dependent upon the maturity of the debt. *Morgan vs. Hedstrom, supra.*"

In *Swan et al vs. Burnham et al*, 49 Atl., 93, the Supreme Court of New Hampshire said of a similar statute:

"No corporation, banks and insurance companies excepted, shall contract debts or incur liabilities exceeding one half the value of its property." Pub. St. c. 150, §4. If, by vote or by its officers a corporation violates this provision, the directors thereby become individually liable, to the amount of the excess, "for the debts and contracts of the corporation then existing or contracted while they remain in office." Id. §5. The effect of these enactments is to impose the liability of the sureties for the corporation upon the directors, to the amount of such excess, as a *penalty* for a violation of these provisions (*Bank vs. Fiske*, 62 N. H., 178, 181), and to give creditors a right of action against the directors to enforce the liability, *independent of their right of action against the corporation.* (*Same vs. Fiske*, 60 N. H., 363, 370.) It is not denied that a cause of action against the directors accrues to existing creditors at the time an indebtedness exceeding one-half the value of the corporate property is *incurred* and, the conditions continuing, to subsequent creditors when their debts are created. But the plaintiffs say that new causes of action accrue to existing creditors whenever the indebtedness of the corporation is increased after the debt limit has been passed. The language of the statute (Pub. St. c. 150 §§4, 5), when taken alone, may be capable of such a construction, but it is not probable that the legislature intended to give to it that meaning. The only apparent purpose of such a provision would be to take causes like those in the present suit out from the operation of the statute of limitations. If such had been the purpose, the legisiature would not have been likely to have left it to be implied, but would have expressed it in terms as definite as those making the directors sureties of the corporation for all indebtedness incurred in excess of one-half of the value of its property. Id. §5. A construction which does not take a cause of action that has once begun to run out of the operation of the statute is in harmony not only with these provisions, but also with the policy of the law, which requires diligence on the part of

the creditors in the enforcement of their claims. It seems more probable than otherwise that the legislature intended that actions of this kind should be begun within six years after the cause of action accrued, and not afterwards. Pub. St. c. 217, §3."

"The fact that the claims of some of the plaintiffs were reduced to judgments against the corporation within six years from the time the debts were contracted is immaterial. It neither prevented the running of the statute against the defendants, nor created an indebtedness that imposed a liability upon them."

In *Cannon vs. Breckinridge Mercantile Company*, 69 Pac., 269, the Colorado Court of Appeals said: "Under the plain reading of the statute,—and it has been repeatedly so held by this court,—a right of action by a creditor against the defaulting directors accrued immediately upon default being made."

"Instantly upon the default being made with reference to filing of the annual report within the time limited, a right of action accrued to the plaintiff against the directors."

The Circuit Court, and the Court of Appeals took a similar view of the statute, but held that it was not necessary to base the decision thereon, since this action was barred even if it did not accrue till the maturity of the original debt, "contracted during such period of neglect."

But the cases are more numerous, which are in accord with the holding of the Circuit Court of Appeals, in the case at bar,—that if "the right of action against the defendant on his statutory liability did not accrue on the creation of the debt it unquestionably did on its maturity, and the statute having once commenced to run could not thereafter be suspended so far forth as concerned the defendant, by any action of the plaintiff and the bank which might have that effect between them." (Opinion of Judge Caldwell, record page 29.)

This construction is the most liberal that can be indulged in favor of the creditor, and at the same time keep in mind a strict construction of this statute, and is fully sustained by the cases cited by Judge Caldwell.

Counsel for plaintiff evidently did not take the trouble to read the cases cited by the Court of Appeals, and subsequent cases from the highest court in New York, else he would not have imposed upon this court the full text of the opinion of Judge Allen, in *Jones vs. Barlow*, which is in direct conflict with all the prior and subsequent decisions in the State of New York, on the question as to when a right of action accrues against directors, trustees, or stockholders, under the various New York statutes.

The opinion of Judge Folger, in *Jones vs. Barlow*, is in full accord with the prior and subsequent cases in that state, and counsel evidently overlooked the statement made by Judge Caldwell to that effect.

Hardman vs. Sage, 124 N. Y., 25, 26 N. E., 354, cited by Judge Caldwell, expressly holds, in accord with the prior opinion of Judge Folger, that the taking of a note which matured beyond the time fixed by the statute did not have the effect of keeping alive defendant's statutory liability. The court said: "If creditors of manufacturing corporations desire to hold its shareholders liable under the tenth section, their claims must become due within a year from the time when contracted, and the period of credit must not be extended by new contracts between the corporation and creditors."

In *Parrott vs. Colby*, 6 Hun., 55, the court said: "We think the liability of stockholders in such cases cannot be revived or extended by any renewal or extension of the indebtedness which the creditors may make with the corporation." This decision was affirmed on appeal in 71 N. Y., 597; and in *Jagger Iron Co. vs. Walker*, 76 N. Y., 521.

Parrott vs. Colby is cited and substantially the same doctrine announced.

But in still later cases the same doctrine is announced under the statute making the trustees liable for certain defaults, where the court uses the language: "Neither the continuance of the default, nor subsequent omissions on the part of the company to make the report, could, as to the debt in question, either renew the old liability or create a new right of action. The statute operates upon the remedy, and the omission of the creditor to pursue it cannot stop its running. The liability of the trustee was imposed by statute and the benefit and suit therefor are limited to the creditor as the one aggrieved. In such case *when the statute begins to run nothing subsequent will stop it.*"

Trinity Church vs. Vanderbilt, 98 N. Y., 170.

In a still later case in that state, the question arose in this form, the Tenny Company, a corporation, became insolvent and was adjudged a bankrupt, but had entered into a composition with its creditors whereby it executed its notes, due in the future, for all of its indebtedness. And in *Wood vs. Vanderveer, et al, Supreme Court of New York, Appellate Division*, 67 N. Y., Sup. 371, the defendants were sued under the statute as trustees for the debts of the company contracted while they were in default in making the reports required by law. The defense was that the time for the payment of the debts of the company having been extended by the composition notes, that no right of action had accrued against the trustees until the maturity of said notes. The court denies this contention in the following language:

"But it may be said with some plausibility that their liability is in the nature of a penalty, and so the courts have held that it is barred within three years, under the

provisions of subdivision 3 of section 383 of the Code of Civil Procedure, as an action upon a statute for a penalty or a forfeiture. But if that be true, and this be a penal action, the discharge of the corporation from the debts without its payment has no effect upon the right of the plaintiffs to recover from these defendants. *This cause of action is created by the statute. It is operative when the debt becomes payable, and, regarding it as a penal action, the amount of the debt is simply the measure of damages which the plaintiffs are entitled to recover because of the liability imposed upon these persons by the law.* After the debt has become due, the creditors are not limited to an action against the corporation to recover it, nor is it necessary that they should begin such an action unless they see fit to do so. They can at once proceed against the directors, and can only be barred from that action by the payment of the debt by the corporation. Indeed, no reason is seen why they may not at the same time maintain an action against the corporation upon its contract liability, and another against the directors upon their statute liability, although, undoubtedly, if judgments were recovered in both actions, the payment of one would work a satisfaction of the other. But the second action is entirely separate and has no connection with the other, and as the defendants here were not parties to the bankruptcy proceedings, and their liability was not in any way questioned in these proceedings, it is clear that in the discharge of the bankrupt, which affected it only, and was personal to it alone, can have no effect whatever upon the right of the plaintiffs to recover against another person, whose *liability for this debt is created by statute, and is entirely independent and separate from the cause of action against the company.*

In a still later case the New York Court of Appeals fully answered this question in language that fully sustains the dissenting opinion of Judge Folger, in *Jones vs. Barlow*, and also sustains the statement of Judge Caldwell that the latter case is not in line with the latest decisions in that state. In *Chapman vs. Lynch*, 51 N. E., 275, decided by

the New York Court of Appeals in 1898, "action is sought to be maintained against the defendant upon the ground that he was a director of the corporation, and as such in company with his associates, had failed to file the annual report required by the statute during the years 1881 to 1888, inclusive."

"It must be remembered," said the court, "that this action is prosecuted to recover a penalty. The action having once accrued and the statute run against it, the bar becomes complete, notwithstanding the subsequent defaults of the defendant and his associates in filing the annual reports called for by the statute. *Neither do we understand that subsequent partial payments by the corporation upon the account affect the running of the statute; they may, as to the corporation under its contracts to pay, but cannot operate to extend the liability of the defendant for the penalty incurred by him. Rector, etc. vs. Vanderbilt*, 98 N. Y., 170–175; *Loose vs. Bullard*, 79 N. Y., 404.

"Nor do we think that the crediting of the interest upon the account semi-annually, affects the liability of the defendant. The cause of action having once accrued, and the defendant having become liable for the penalty, the statute commenced to run, and was not stopped by either credits of payments or the charges of interest accrued thereafter made by the company."

Turning now to the California case, also cited by Judge Caldwell, we find the same rule announced.

In *Mokelunne Hill Canal Co. vs. Woodburry*, 14 Cal., 265, Justice Cope says: "It seems from a just and reasonable construction of the constitutional and statutory provisions upon this subject that an individual corporator, in respect to his personal liability for the debt of the corporation, does not occupy the position of a *surety* but that of a *principal* debtor."

"It is *not in any sense contingent* but it is declared to be *absolute and unconditional.*" This case is quoted and

followed in *Davidson vs. Rankin*, 34 Cal., 503. These cases are also cited and followed in the later case of *Hyman vs. Coleman*, 82 Cal., 650, 16 Am. St., 178. This latter case is cited by Judge Caldwell, and so fully sustains his views that we give it in full on this point.

"This is an action to recover from the defendants as stockholders of a corporation, their several proportions of an indebtedness due plaintiff from the corporation."

"The complaint contains two counts. In the first it is alleged that plaintiff advanced and loaned to the corporation, on the seventh day of October, 1879, the sum of two thousand dollars, for which the corporation then and there executed to plaintiff its promissory note, payable in one year after date, with interest, and that '*said promissory note was renewed by said corporation each year by the surrender of all former notes given by said corporation to plaintiff, and the execution and delivery of new notes to plaintiff for the amounts due upon said indebtedness.*' It further alleges that the capital stock of the corporation was divided into one thousand shares, and states the number of shares owned by each defendant on the 7th of October, 1879."

"The second count alleges another loan by plaintiff to the corporation of one thousand dollars, on the sixteenth day of December, 1879, and the execution of its promissory note for that sum, payable one year after its date, with interest, *and a like surrender and yearly renewal of the same by the corporation.* It further states the number of shares of the capital stock of the corporation owned by each defendant on the last-named date."

"The complaint then alleges that on the eighth day of September, 1883, an accounting as to the amount of the aforesaid indebtedness was had between the corporation and plaintiff, and that plaintiff then surrendered the notes which he held, and the corporation executed to him for such indebtedness four new notes, dated December 16, 1883, and payable one year after date, with interest.

"This action was commenced in April, 1885, and is based upon three of the last-named notes, one of the four having been paid. The defendant demurred to the com-

plaint upon the ground that it did not state facts sufficient to constitute a cause of action, and that the cause of action was barred by the statute of limitations.

"The court sustained the demurrer, and rendered judgment for defendants, and the plaintiff appealed.

"It is not claimed that the renewals of its notes by the corporation created any new debt or liability against the defendants, and it is clear that if the renewals had had the effect to extinguish the old debt, and create a new one, then the complaint stated no cause of action, for the reason that it did not allege that the defendants were stockholders of the corporation when any of the renewals were made. *The only question then is, did the renewals operate to extend the time of payment of the original indebtedness, and thereby prevent the statute of limitations from beginning to run in favor of those who were stockholders when that indebtedness accrued until the last notes matured, on the 16th of December, 1884?*

"It is settled law in this state that, under our constitution and statutes, each stockholder of a corporation is liable for his portion of the corporate debts *contracted* while he was a stockholder, as a *principal debtor*, and not as a surety: *Mokelunne Hill Canal vs. Woodbury*, 14 Cal., 265, 73 Am. Dec., 658; *Neilson vs. Crawford*, 52 Cal., 248; *Sonoma Valley Ban vs. Hill*, 59 Cal., 107; *Morrow vs. Superior Court*, 34 Cal., 383.

"The liability commences and a right of action accrues against the corporation and stockholders at the same time: *Davidson vs. Rankin*, 34 Cal., 503; *Mitchell vs. Beckman*, 64 Cal., 117.

"Suspension of the remedy against the corporation does not suspend the remedy against or affect the liability of the stockholders: *Young vs. Rosenbaum*, 39 Cal., 646.

"A judgment against the corporation does not create a new liability, nor extend the time prescribed by the statute of limitations for bringing suit against the stockholders: *Larracee vs. Baldwin*, 35 Cal., 168; *Stephen vs. Ware*, 45 Cal., 110.

"The liability of stockholders is created by statute, and an action to enforce that liability must be brought within

three years after the cause of action accrues: *Code Civ. Proc.*, Secs. 338, subd. 1, and 359; *Green vs. Beckman*, 59 Cal., 545; *Moore vs. Boyd*, 74 Cal., 167.

"In New York it has been held that the renewal of a note by a corporation does not extend the time prescribed by the statute for suing a stockholder. In *Parrott vs. Colby*, 6 Hun., 55, the court said: 'We think the liability of stockholders in such cases cannot be revived or extended by any renewal or extension of the indebtedness which the creditors may make with the corporation.' This decision was affirmed on appeal in 71 N. Y., 597; and in *Jagger Iron Co. vs. Walker*, 76 N. Y., 521; *Parrott vs. Colby* is cited, and substantially the same doctrine announced.

"In view of the foregoing authorities, our conclusion is, that the plaintiff's right of action against the defendants commenced when his first notes matured, and was barred in three years thereafter."

In the still later case of *Redington vs. Cornwell*, 90 Cal., 63, the court in speaking of the effect of an open current account to keep alive this statutory liability of a stockholder, said:

"The averment as to the mutual open account in the third amended complaint is of doubtful sufficiency to extend the period of limitation even against the corporation. As to the stockholders, it can have no effect whatever even though sufficiently alleged. *The corporation had no more power to extend the period of limitation as against the stockholders by a mutual open account than by making its promissory note.* The liability of the stockholders is created and exists by statute. It arises when a debt is contracted by the corporation. It is limited to three years from the time it arises; and it is well settled in this state that the corporation has no power to extend that limitation without direct authority from the stockholders."

Again in *Hunt vs. Ward*, 99 Cal., 612, 37 Am. Sr., 87, the same rule is announced.

In *Swan et al vs. Burnham et al*, 49 Atl., 93, *supra*: "The fact that the claims of some of the plaintiffs were re-

duced to judgments against the corporation within six years from the time the debts were contracted is immaterial. It neither prevented the running of the statute against the defendants, nor created an indebtedness that imposed a liability upon them."

If additional authority is needed to sustain the opinion of the Circuit Court of Appeals, and as a complete answer to the doctrine of *Jones vs. Barlow*, it is found in the decision of the United States Circuit Court for the District of Oregon, 86 Fed. Rep., 85, where Judge Gilbert disposes of the question in the following language:

"Counsel for plaintiff contend that by the decision in *Huntington vs. Attrill*, 146 U. S., 657, 13 Sup. Ct., 224, the Supreme Court has overruled its former holding that such a statute is penal. It will be seen, however, on a careful consideration of that case, that the decision was based upon a consideration of the remedial purpose of the statute and the protection intended to the creditor, and that the court went no further than to hold that such a statute is not penal, in the sense that it will not be enforced in a state other than that in which the liability was created. In the later case of *Bank vs. Remsen*, 158 U. S., 337, 15 Sup. Ct., 891, it was again ruled that such a statute is one of a penal character, and in the opinion of the court remarked that the purport of the decision in *Huntington vs. Attrill* was that such a statute was not 'penal law in the international sense.'

"The action being for a penalty, and subject to be barred at the end of three years, *the question next arises, at what date did the statute of limitations begin to run?* The statutory liability of the directors is joint and several for all the debts of the corporation 'then existing or incurred while they remain in office.' It is contended on behalf of the defendant that the statute began to run from the date when the illegal dividend was declared, notwithstanding that the debt was not then due. So far as the question appears to have been adjudicated in other states, it is held that no cause of action accrues against the directors until the debt of the corporation is due. *Sullivan vs. Manufac-*

turing Co., 20 S. C., 79. *Woolverton vs. Taylor*, 132 Ill., 197, 23 N. E., 1007. But it is unnecessary to decide that question in the present case. Assuming that the cause of action against the defendant did not accrue until the debt became due, on February 11, 1894, it still appears that more than three years had intervened, when, on October 27, 1897, this action was commenced. *It is plain that the action was barred, therefore, unless the statute of limitations was suspended either by the agreement of April 10, 1894, extending the time of payment of the debt, or by the payment of $485.91 on account September 15, 1897.*

"Did the agreement between the plaintiff and the corporation, whereby the time of payment of plaintiff's deposit was extended, operate to toll the statute of limitations, which had begun to run in favor of the directors? But little light upon this question is afforded by the decisions of other courts. In *Jones vs. Barlow*, 62 N. Y., 202, in an action brought to enforce the statutory liability of directors for failure to file an annual report in January, 1871, as required by law, it appeared that during the year 1871 the plaintiff sold to the corporation goods for which, on December 26, 1871, it was indebted to him in the sum of $6,292.78, for which it gave him its notes due and payable on June 6, 1872. On that date ten new notes were given, maturing at successive intervals. The action was commenced against the trustees to enforce their statutory liability, on February 7, 1873, before the last three notes were due. It was held that the plaintiff was not entitled to recover on the three notes that had not yet matured. The court said:

" 'Whatever limitations and conditions attach to the corporate and primary obligation, whether attaching to it at its inception or growing out of subsequent lawful agreement of the parties, necessarily limit and qualify the liability of the trustees.'

"It is contended by the defendant that the statute of limitations was not necessarily under consideration in that case. It is apparent, however, that the principal on which the statute is to be applied was directly involved. The court decided that the plaintiff was bound by the contract of the corporation extending the time of payment of the debt,

and that he had no cause of action until that time expired. In that case, as in the case at bar, the debt had matured, and a cause of action had arisin before the execution of the new notes and the extension of the time of payment. The new notes so taken were not evidence of a new contract or a newly-created liability. They were but the means of postponing the time of payment. But in the case of *Blake vs. Clausen*, 38 N. Y. Supp., 514, *decided in 1896*, the Supreme Court of New York denied that *Jones vs. Barlow* was authority for the proposition which is here contended for by the plaintiff, expressing the view that the 'statute of limitations was in no manner involved' in that decision, and held that in a case similar to the case at bar the statute began to run from the moment when the debt became due and a cause of action accrued, and that the operation of the statute could not be suspended by renewals or extensions granted without the knowledge or consent of the trustee sought to be charged. There is no direct intimation in the opinion that the ruling would have been otherwise if a trustee had consented to the extension. On appeal to the appellate division of that court, the decision was affirmed upon the ground that the statute of limitations began to run from the moment when the note fell due, and that, when a cause of action accrued and the statute began to run, no subsequent agreement between the corporation and the creditor could suspend its operation. *Blake vs. Clausen* (Sup.) 41 N. Y. Supp., 772. Opposed to the case of *Jones vs. Barlow*, and, as I hold, expressing the correct doctrine, are the cases of *Bassett vs. Hotel Co.*, 47 Vt., 314, and *Sullivan vs. Manufacturing Co.*, 20 S. C., 79. In *Bassett vs. Hotel Co.*, it was held that the statutory right of action against directors accrued when the debt was contracted and that the statute then began to run, and that a judgment thereafter recovered against the corporation did not operate to suspend it. In *Sullivan vs. Manufacturing Co.*, it was held that the personal liability of the directors, resulting from their failure to perform certain duties, arose at the time of such failure; that the statute of limitations then began to run; and that a subsequent renewal of the debt, by giving a new note therefor, did not suspend its operation. In harmony

with these cases are certain decisions applying the statute of limitations to actions against directors for their failure to file reports as required by statute. Thus, it is held that, where a corporation fails to made its annual report, its trustees at once become indivieually liable for its debts, and that the statute of limitations thereupon begins to run in favor of all debts then due, and that subsequent defaults in making annual settlements do not renew such causes of action, notwithstanding that the statute attaches the liability both to the debts existing when the default is made and to those contracted thereafter until the report is filed. *Lowee vs. Bullard*, 79 N. Y., 404; *Rector, etc. vs. Vanderbilt*, 98 N. Y., 170; *Bank vs. Johnson*, (Mont.) 45 Pac., 662."

In this connection the reasoning of Judge Caldwell is appropriate:

"At the time when the first renewal notes were taken the debt and the original notes given therefor had then become due and payable. The renewal of the notes operated as an extension of time for the payment of the debts by the bank but did not release the defendant either from his statutory liability to pay the debts or from immediate action therefor. As soon as the original notes became due and payable, if not before, the defendant was liable. The defendant was unquestionably then liable to an action and so was the bank. They were concurrent and independent. The plaintiff could assert either or both. The assertion of one would not preclude the assertion of the other. Suspending the assertion of the one would not preclude the assertion of the other. Nothing but satisfaction of the plaintiff's debts by the pursuit of one would take away its right to follow the other. If, therefore, the right of action against the defendant on his statutory liability did not accrue on the creation of the debt it unquestionably did on its maturity, and the statute having once commenced to run could not thereafter be suspended so far forth as concerned the defendant, by any action of the plaintiff and the bank which might have that effect as between them. Without pursuing the subject further, we may say that we concur in

the opinion of Judge Folger in *Jones vs. Barlow*, 62 N. Y., 202, 213, and have in substance adopted its reasoning; it seems to have been followed in later cases in that state (*Hardman vs. Sage*, 124 N. Y., 25; *Parrott vs. Colby*, 6 Hun., 55, *affirmed on appeal in* 71 N. Y., 597; *Jagger Iron Co. vs. Walker*, 76 N. Y., 521), and elsewhere—*Mokelunne Hill Canal Co. vs. Woodbury*, 14 Cal., 265; *Davidson vs. Randen*, 34 Cal., 503; *Hyman vs. Coleman*, 82 Cal., 650; *Young vs. Rosenbaum*, 39 Cal., 646."

"The complaint counts on an open account also, touching which it is only necessary to say that that portion of the account contracted while the defendant was president is clearly barred and for that portion of the account contracted after he ceased to be president, he never was liable."

III.

Counsel for plaintiff in error disposes of the third, fourth and fifth grounds of the demurrer with this statement:

"I do not discuss the third, fourth and fifth subdivisions of the demurrer, the last because it is too general, and the third and fourth because a casual glance at the complaint will show that they have no foundation in fact."

In this connection we wish to remark that there is equally as much, if not more merit, in these assignments than there appears to be in that portion of plaintiff's complaint, which is bottomed on the open account, which shows on its face to have been made long after defendant went out of office, and which has been urged in the lower court and is now urged in this court with the same earnestness that characterizes the counsel's argument on the promissory notes.

We are, however, unwilling to admit that these grounds of demurrer are not well taken.

The third assignment is:

"That the complaint does not allege that defendant was president of the Bank of Mammoth Springs when the debt sued for was contradted."

If it is true that the complaint fails to allege this material matter, certainly under the statute, section 1347, *supra*, there would be a failure to allege a cause of action.

As to the first note it is alleged: "That on September 6th, 1894, said Bank of Mammoth Springs *became indebted* to plaintiff *** by note." We contend that these words "became indebted" do not amount to an allegation that the bank on that date *contracted* the debt.

But the language of the complaint as to the second note is still more indefinite: "That on May 3rd, 1894, said Bank of Mammoth Springs *was also indebted* *** by note." While as to the open account the allegation is: "That in the years 1894 to 1897, inclusive, said bank *was likewise indebted* to plaintiff in various sums, at different times due upon open account."

It is alleged that defendant was president of the bank from June 9th, 1891, to June 9th, 1896, and we contend that there is no allegation that the debts sued for were "contracted" between these two dates. The clear language of the statute is that the president shall be liable for debts "contracted during the period of any such neglect or refusal." For aught that appears the debt evidenced by these notes might have been contracted years before defendant was president. If it be argued that the words "became indebted," are synonymous with the statutory word "contracted," what can be urged in defense of the words "was indebted," used with reference to the second note and the open account?

This court fully considered the question of pleadings and proof under a similar statute against trustees in the case of *Chase vs. Curtis, supra*, and we submit that the allegations as to when these debts were contracted do not come up to the standard there laid down, and which is supported by all the cases.

In *Whitney Arms Co. vs. Barlow*, 63 N. Y., 62, cited with approval by this court in *Chase vs. Curtis, supra*, it is said: "The facts upon which the debts are founded, must be proved." It follows, of course, that such facts should be alleged.

The fourth ground of demurrer is:

"That said complaint does not allege that the debts sued for were contracted during the period of defendant's neglect or refusal to file the certificate required by section 1337 of the Digest."

The case of *Chase vs. Curtis, supra*, and cases cited are also in point in support of this ground of demurrer.

In *Brown vs. Clow*, 62 N. E., 1006, the Supreme Court of Indiana speaking of the sufficiency of the proof of the indebtedness for which directors are liable for failure to comply with the law said:

"Among the reasons for a new trial is the objection that the amount of the recovery was too large. The court took the judgment rendered in favor of the appellees against the corporation in the action upon their claim as the basis of the liability of the directors and assessed the recovery in the present action at the amount of that judgment and interest thereon. In this, it seems, the court fell in error. The liability of the delinquent directors, as fixed by the statute, is limited to the amounts of debts contracted by the corporation after the wrongful act of the directors which caused the insolvency of the company. By this must be under-

stood the sums for which the insolvent corporation orinally became indebted. It has been held in similar cases that, where a judgment has been recovered against a corporation for the debt, such judgment is not admissable to establish the debt, but that proof must be made of the transaction out of which the indebtedness arose. *Chase vs. Curtis*, 113 U. S., 452, 5 Sup. Ct., 554, 28 L. Ed., 1038; *Miller vs. White*, 50 N. Y., 137; *Esmond vs. Bullard*, 16 Hun., 65; *Kraft vs. Coykendall*, 34 Hun.

The fifth ground of demurrer, which counsel criticises as "too general to be considered," is:

"Because said complaint does not state facts sufficient to constitute a cause of action."

The third and fourth grounds might be treated as specifications under this last assignment, and what we have said with reference to them applies here. But the complaint fails to state a cause of action in favor of *this plaintiff* and *against this defendant*, for other reasons than those already pointed out. It is sought to bring the defendant within the provisions of the Statute of Arkansas, by the following allegations:

"That said Bank of Mammoth Springs was incorporated and organized under the provisions of the law as set forth in sections 1326 to 1358 inclusive, of said Digest, and therefore subject to all its terms."

Sections 1326 to 1358, inclusive, cover the entire act of April 12th, 1869, which relate to manufacturing and other business corporations. Section 1326, which is the first section of the act, enumerates the purposes for which private corporations under this act may be organized:

"Section 1326. Any number of persons, not less than three, who, by articles of agreement in writing, have associated, or shall associate, according to the provisions of this

act, under any name assumed by them, for the purpose of engaging in or carrying on any kind of *manufacturing, mechanical, mining, or other lawful business* and who shall comply with all the provisions of this act, shall, with their successors or assigns, constitute a body politic and corporate, under the name assumed by them in their articles of association."

The word "bank" nowhere appears in this act, neither is the officer, "cashier," anywhere mentioned. Unless the words "*or other lawful business*" include banks, and was intended by the legislature to include banks, then section 1347, on which this action is based, does not apply to the president of a bank and the defendant would not be liable in this action.

Are banks *ejusdem generis* with manufacturing, mechanical and mining companies?

Statutes, constitutions, and written instruments fall under that "good rule of construction," which requires that "where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class." Broom's Leg. Max. (6 Am. Ed.) s. p. 625.

We will impose upon this court some of the "wise saws and modern instances" illustrating this "good old" rule:

"Thus in *Reg. vs. Whitnash*, 7 Barn. & C., 596, Stat. Car. II., chapter 7, section 1, provided, 'that no tradesman, artificer, workman, laborer, or other person whatsoever' should exercise his ordinary calling on the Lord's day. And thereupon it was ruled that the words 'other person' did not include a *farmer*, because not of like denominations with those specifically mentioned; BAYLEY, J., remarking that if all persons were meant, there would be no need of the specific enumeration."

"So in Exparte HILL, 3 C. & P., 225, under the common law rule that where general words follow particular and specific words, the former must be confined to things of the same kind, it was ruled that a 'bull' was not included under the words 'other cattle,' as used in a statute which made it indictable for any person to 'wantonly and cruelly beat, abuse, or ill treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle,' the court saying: 'Horse, mare, and gelding are one class; ox, cow, heifer, and steer are another class; and *** the bull is not included in this act.' "

"*Sandiman vs. Breach*, 7 B. & C., 96, was an action of assumpsit brought to recover the expenses of hiring a postchaise, the defendant having failed to convey plaintiff in his stagecoach as he had contracted to do. For the defense it was contended that the contract was illegal, because it was to be performed on the Sabbath. Lord Tendeden did not approve this contention and in delivering the unanimous opinion of the court of queen's bench said:

" 'It was objected that the plaintiff in this case could not recover, because the contract, for the breach of which the action was brought, was to have been performed on the Sabbath day, and that it could not legally be performed on that day. But upon looking into the statutes (3 Car. 1, chap. 1, and 29 Car. 2, chap. 7), upon which the objection was founded, we are of the opinion that this case does not come within them. *** By the first of these, the 3 Car. 1, chapter 1, it was enacted that "no carrier with any horse, nor wagon-man with any wagon, nor cartman with any cart, nor wainman with any wain, nor drover with any cattle, shall by themselves, or any other, travel on the Lord's day;" and by the 29 Car. 2, chap. 7, that "no tradesman, artificer, workman, laborer or other person or persons, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day." It was contended that under the words "other person or persons" the drivers of stagecoaches are included. But where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*. Considering then, that in the 3 Car. 1, chapter 1, carriers of a certain descrip-

tion are mentioned, and that in the 29 Car. 2, chapter 7, drovers, horse-coursers, wagoners, and travelers of certain descriptions, are specifically mentioned, we think that the words or other person or persons cannot have been used in a sense large enough to include owner and the driver of a stagecoach.' "

"That case was approvingly cited and followed in *St. Louis vs. Laughlin*, 49 Mo., 559, where a question arose as to whether a license tax could be imposed on the profession of a lawyer. The charter under which the city authorities proceeded in imposing the tax, provided as follows: 'The mayor and city council shall have power within the city, by ordinance not inconsistent with any laws of this state, to license, tax, and regulate auctioneers, grocers, merchants, retailers, hotels, boarding houses, tenement houses, office buildings, public halls, public grounds, concerts, photographers, artists, agents, porters, runners, drummers, public lecturers, public meetings and shows, real estate agents and brokers, horse and cattle dealers, beerhouses, patentright dealers, inspectors and gaugers, stockyard proprietors, examiners of titles, conveyancers, mercantile agents, insurance companies, banking or other corporations or institutions, street railroad cars, hackney carriages or omnibuses, carts, drays, and all other carriages, and all other business, trades, avocations, or professions whatever.' And it was held, following the ruling in the case just previously cited, that the city had no power to impose a license tax on a lawyer, notwithstanding the charter as quoted, concludes with the words '*all other business, trades, avocations, or professions whatever.*' "

There is still another reason why the complaint fails to state a cause of action in favor of this plaintiff. The statute invoked makes the president and secretary of private corporations, of the class named, jointly and severally liable for *all debts contracted druing the period of such neglect or refusal to file the certificate required*, and the question which confronts the plaintiff at the threshold of this law-suit is

this: Can the plaintiff maintain this action in his own name for his own use, exclusively, without allegation that he is the only creditor whose debt was contracted during the same period of neglect? In other words, the plaintiff alleges that the Bank of Mammoth Springs is insolvent, and he seeks to hold the defendant liable on the assumption that the debts sued for were "contracted" while the defendant was president of the bank in default in filing the financial statement required by law. Now suppose there are other creditors, similarly situated, and it is reasonable to assume that there are, if the bank is insolvent, can the plaintiff sue and possibly exhaust this asset, the defendant's liability, to satisfy his individual claims and leave the other creditors without relief?

If an individual creditor can in any event sue in his own right to recover his own debt under this statute, we think that he should allege as a condition precedent that there are no other creditors similarly situated. But the authorities are against the right of one creditor to maintain an action at law for his separate debt against defaulting officers of corporations under statutes like these.

The case of *Stone vs. Chisolm*, 113 U. S., 302, was based on a statute of South Carolina, making the directors liable where they consent to the making of the debts in excess of the capital stock of the company, and this court said:

"The evident intention of the provision is that the liability shall be for the common benefit of all entitled to enforce it according to their interest and apportionment, which, in case there cannot be satisfaction for all, can only be made in a single proceeding to which all interested can be made parties."

"The case cannot be distinguished from that of *Homer vs. Henning*, 93 U. S., 228, the reasoning and result in which we affirm."

"It is immaterial that in the present case it does not appear that there are other creditors than the plaintiff in error. There can be but one rule for construing the section, whether the creditors be one or many."

And it was held that a suit in equity is the proper remedy in the courts of the United States to enforce the statutory liability of directors to a creditor of a corporation by reason of the debts of a corporation being in excess of the capital stock, and that an action at law by a single creditor would not lie.

In conclusion, we submit that the judgment of the Circuit Court of Appeals sustaining the demurrer herein should be affirmed.

W. J. ORR,
Attorney for Defendant in Error.